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660945—43

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 269

MILTON ROE SABIN AND BERTHA FLORENCE SABIN, PETITIONERS

v.

HOME OWNERS' LOAN CORPORATION, A CORPORATION; O. K. WETZEL; P. L. MURPHY; A. GARLAND MARRS, SHERIFF OF TULSA COUNTY, OKLAHOMA; W. S. DUGGINS, NATE MARTIN, JOHN BURNETT AND TOM KITHCART, DEPUTY SHERIFFS OF TULSA COUNTY, OKLAHOMA; CAL CRUM, CLERK OF THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA; AND JOE HODGES, DOING BUSINESS UNDER THE NAME AND STYLE OF JOE HODGES TRANSFER AND STORAGE

ON MOTION FOR LEAVE TO PROCEED ON A TYPEWRITTEN RECORD AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE HOME OWNERS' LOAN CORPORATION IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The district court wrote no opinion in this case but its instructions to the jury appear at R. 308–318.

The opinion of the Circuit Court of Appeals (R. 399–406) is reported in 147 F. 2d 653. An opinion of the Oklahoma Supreme Court in an earlier and related phase of this litigation is reported at 187 Okla. 504.

JURISDICTION

The judgment of the Circuit Court of Appeals was rendered on February 21, 1945 (R. 407), and a petition for rehearing was denied on March 19, 1945 (R. 435). The time within which a petition for a writ of certiorari might be filed was extended by Mr. Justice Rutledge until July 19, 1945, and, on July 13, 1945, Mr. Justice Black granted a further extension until July 28, 1945. The petition for a writ of certiorari was filed on July 27, 1945. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether petitioners may collaterally attack the validity of a deed issued to the Home Owners' Loan Corporation, pursuant to the order of a state court, on the ground that, at the time of the issuance of the deed, execution was stayed.

2. Whether an alias writ of assistance, under which the Home Owners' Loan Corporation was put in possession of property which was the subject of a mortgage foreclosure suit, was void because it issued out of the state trial court while a petition to recall the mandate was pending in the state appellate court.

STATUTES INVOLVED

The pertinent provisions of the Oklahoma statutes are set out in the Appendix, *infra*, pp. 9–12.

STATEMENT

In an action in the District Court of Tulsa County, Oklahoma, the Home Owners' Loan Corporation, on January 10, 1938, secured a judgment on a note made by petitioners and were granted an order of foreclosure on the mortgage securing that note (R. 34, 331–333). A motion for a new trial was overruled on February 9, 1938, and, on August 8, 1938, an appeal was taken from this judgment but no supersedeas bond was filed (R. 35, *Sabin* v. *Home Owners' Loan Corporation*, 187 Okla. 504, 506). In the period that intervened between the judgment and the perfection of the appeal to the Supreme Court of Oklahoma, the district court issued an order of sale (R. 132, 341–342), and the property was purchased, pursuant to this order, by the Home Owners' Loan Corporation. The sale was confirmed, over the petitioners' objection, on September 9, 1938. (R. 35, 349–350.) A sheriff's deed issued on that date and was delivered (R. 351–352). Petitioners, having given notice of their intention to appeal from the order of confirmation, were granted an extension of time within which to make and serve case-made and were also granted twenty days within which to file a supersedeas bond in the amount of $6500 (R. 350). No such bond was filed, but within the twenty days, the Supreme Court of Oklahoma

granted petitioners additional time within which to file a supersedeas bond, and stayed the execution of the order of the district court until further order of the supreme court of the State (R. 136, 375). Petitioners, on February 27, 1939, were granted leave to file, and did file a supersedeas bond in the amount of $2000, and further proceedings under the foreclosure judgment were stayed (R. 132, 344–347). The Supreme Court of Oklahoma affirmed the foreclosure judgment and upheld the order confirming the sale on May 28, 1940. *Sabin* v. *Home Owners' Loan Corporation*, 187 Okla. 504. A petition for rehearing was denied on July 16, 1940 (*Sabin* v. *Home Owners Loan Corporation*, 187 Okla. 504), and a petition for certiorari was denied by this Court. 313 U. S. 570, rehearing denied, 313 U. S. 601. The mandate of the Oklahoma Supreme Court issued to the District Court of Tulsa County on June 13, 1941 (R. 354).

More than a month after the mandate had been issued and had been spread on record in the trial court, an alias writ of assistance was issued (R. 157, 376); by this writ the Sheriff of Tulsa County was ordered to put the H. O. L. C. in possession of the property. On July 24, 1941, leave was granted to the petitioners to file a petition to recall the mandate and to grant a rehearing, and such petition was filed (R. 356–359). This petition was denied (R. 385), and a petition for a writ of certiorari to this Court was also denied. 315 U. S. 800, rehearing denied, 315 U. S. 829. While the petition asking the Supreme Court of Oklahoma to recall its mandate was

pending, the sheriff, acting through his deputies, executed the alias writ of assistance by removing the household furniture, three automobiles, and other personal property, and by placing the purchaser in possession (R. 263, 376).

This suit was instituted on July 24, 1943, in the District Court for Tulsa County, Oklahoma, against the H. O. L. C.; O. K. Wetzel, an attorney who represented the H. O. L. C. in the foreclosure proceedings; P. L. Murphy, an agent of the H. O. L. C.; Cal Crum, the clerk of the state court who issued the order of sale (R. 73), a writ of assistance which was recalled (R. 378), and the alias writ of assistance; the sheriff and the deputies who took part in executing the alias writ of assistance; and the owner of the transfer and storage company that removed the personal property of the petitioners under the direction of the sheriff (R. 2–25). Petitioners alleged that their personal property was removed by the respondents without any legal right, and that respondents were liable for damages in excess of $400,000 (R. 2–24). A petition for removal to the District Court of the United States for the Northern District of Oklahoma (R. 25–27) was sustained (R. 32), and that court, at the close of the petitioners' evidence, dismissed the petition as to Wetzel, Murphy, and Crum (R. 84). At the conclusion of all of the evidence, the court directed a verdict on behalf of the H. O. L. C. (R. 290), and submitted the case of the other respondents to the jury, but with reference to matters not here involved (R. 313).

The jury found for the respondents (R. 81, 82, 319), and after a motion for a new trial (R. 86–88) was overruled (R. 90), judgment was entered against the petitioners (R. 83–85). The Circuit Court of Appeals affirmed (R. 407).

ARGUMENT

1. Petitioners contend that the sheriff's deed to the H. O. L. C. was void because it was delivered at a time when the execution of the order of confirmation had been stayed (Pet. 13–25). Whatever the merits of petitioners' view that execution had been stayed (cf. R. 404–405), it is clear that under the law of Oklahoma, controlling here, the alleged defect in the deed will not support the collateral attack on the H. O. L. C.'s title and right to possession here attempted. *Christy* v. *Springs*, 11 Okla. 710, 717–719. While petitioners gave notice of their intention to appeal the order of confirmation (R. 350), they do not contend that at the time the deed was executed, an appeal had been perfected. Indeed, the record is barren of any showing as to the time when the appeal from the order of confirmation was perfected (cf. R. 404). Consequently, *Johnston* v. *Johnson*, 104 Okla. 131, particularly relied upon by petitioners (Pet. 23–24), is inapplicable, for, in that case, the Oklahoma Supreme Court upheld a collateral attack on the trial court's possessory order because it appeared that when the order was issued an appeal had already been perfected and that the trial court, therefore, no longer had jurisdiction of the

cause. The authorities relied on by the court in the *Johnston* case, *supra* at 133, leave no doubt but that this was the sole ground for the judgment there rendered.

2. Petitioners further assert that the alias writ of assistance, pursuant to which the H. O. L. C. was put into possession, was void because it issued out of the Tulsa County district court while a petition to recall the mandate was pending in the Supreme Court of Oklahoma (Pet. 25–33). But before the alias writ of assistance was issued, the mandate of the Supreme Court had been issued and spread upon the records of the trial court (see *supra*, p. 4) and, under Oklahoma law, it is clear that the trial court had jurisdiction to make any order or enter any judgment in the further progress of the cause not inconsistent with the decision of the Supreme Court. *Harper* v. *Aetna Building & Loan Ass'n*, 88 Okla. 128; *Crews* v. *Bird*, 141 Okla. 143. See also 12 Okla. Stats. Ann. 1941, Sec. 975, Appendix, *infra*, pp. 11-12. The jurisdiction of the trial court is not again divested unless the mandate is recalled (*Brann* v. *Harris*, 173 Okla. 167, 168) and that was not the case here.

Indeed, the Supreme Court of Oklahoma has held that it has no jurisdiction to recall the mandate unless it clearly appears from the record that it was issued through fraud, accident, inadvertence, or mistake. *Thomas* v. *Thomas*, 27 Okla. 784, 801; see *Thompson* v. *Nickle*, 113 Okla. 44. The denial of the petition for rehearing (R. 385) constitutes a ruling of the Oklahoma Supreme Court, then, that

it had no jurisdiction over the cause because the mandate had issued and there was no fraud, accident, inadvertence, or mistake. The state supreme court has "power," of course, to determine its jurisdiction, and that determination is controlling here. Although they are otherwise distinguishable, cases arising in other States or in the federal courts can, for this reason alone, afford petitioners no aid.

CONCLUSION

The judgment of the court below is correct and there is no conflict of decisions. Resolution of the issues in this case turns entirely on Oklahoma law, and there is no warrant for further review.

The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

HAROLD JUDSON,
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Home Owners' Loan Corporation.

SEPTEMBER 1945.